

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5447 of 1994

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH

and

HON'BLE MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

DENISH INDUSTRIES LTD.

Versus

INCOME TAX OFFICER

Appearance:

1. Special Civil Application No. 5447 of 1994
MR TUSHAR P.HEMANI FOR MR SN SOPARKAR, Sr. Advocate
for Petitioner No. 1
MR MANISH R BHATT for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE M.S.SHAH

and

HON'BLE MR.JUSTICE D.A.MEHTA

Date of decision: 15/07/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

This petition under Article 226 of the Constitution challenges the notice dated 31/3/1994 issued by the Income Tax Officer (Annexure-A) under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') read with Section 147 thereof proposing to reopen assessment of Denish Syntex Private Limited for A.Y. 1983-84 on the ground that on account of insertion of Explanation 8 to Section 43(1) as introduced by the Finance Act, 1986 with retrospective effect from 1/4/1974, the assessee was not entitled to claim depreciation of investment allowance on the capitalization of interest paid prior to the date on which the machinery was first installed and put to use.

2 The facts leading to filing of the present petition are as under.

For A.Y. 1983-84 Denish Syntex Pvt. Ltd.(DSPL) which was subsequently amalgamated with the petitioner -Company filed its return of income claiming loss of Rs.55,82,920/-. In the said return, the DSPL had stated that the DSPL had calculated investment allowance and depreciation on capitalization of interest payable on Rs.33,87,725/- over contracted periods on term loans received from the GIIC and GSFC. The DSPL had inserted the following note as Note No.(2) below statement of computation of assessable loans :-

"(2) The Co. has calculated Investment Allowance & Depreciation on capitalization of interest payable of Rs.33,87,725/- (Including paid during the year Rs.8,03,435/-) over contracted periods on term loans received from GIIC & GSFC, utilized on Fixed Assets calculated on proportion of term loan & Fixed Assets, as liabilities accrues or arises at the time of availment of loans".

3 The assessment of DSPL was framed under Section 143(3) read with Section 144B of the Act. Against the assessment order dated 28/1/1984 (Annexure-C), the DSPL preferred an appeal before the first appellate authority, in so far as the assessment order was against DSPL and DSPL succeeded in those proceedings but the same has nothing to do with the controversy involved in the present petition. Thereafter, on 31/3/1994 the respondent-Income Tax Officer issued the impugned notice under Sections 147 & 148 of the Act.

4 In response to the notice issued by this Court, affidavit-in-reply dated 29/4/1994 came to be filed by the respondent-officer stating that the assessee had

capitalised an amount of Rs.33,87,725/= being the interest paid to GIIC and GSFC for the acquisition of fixed assets. The value of the assets was overstated by this extent. The petitioner-Company claimed depreciation and investment allowance on the cost of the assets which included the interest capitalised as above. The claim of the assessee was allowed without touching the aspect of capitalization of interest. This resulted into excess allowance of depreciation and investment allowance. After taking the aforesaid stand, the deponent of the affidavit-in-reply stated as under:-

"I submit that upto 1986, they were different views expressed by the Hon'ble Courts on the aspect as to whether the interest in connection with the acquisition of an asset, is to be included in the cost of the assets or to be allowed as revenue expenditure. It is submitted that explanation 8 to section 43(1) was introduced by the Finance Act 1986 with retrospective effect from 1/4/1974. The explanation reads as under :

'For the removal of doubts, it is hereby declared that where any amount is payable as interest in connection with the acquisition of an asset, so much of such amount as is relatable to any period after such asset is first put to use shall not be included, and shall be deemed never to have been included in the actual cost of such asset'.

It is submitted that with the introduction of the explanation, the controversy as regards interest, vis-a-vis the actual cost was set at rest. As per the explanation, any amount which is paid or payable as interest in connection with acquisition of the asset, so much or such amount as is relatable to any period after such asset put to use shall not be included and shall be deemed never to have been included in the actual cost of such asset. In the present case, the petitioner company had capitalised the interest relevant to the entire contracted period as a result of which the cost of assets is over stated to the extent of Rs.33,87,725/-. Because of this overstatement of actual cost, excess depreciation and investment allowance has been allowed to the petitioner company. In view of these reasons,

after obtaining prior approval, I have issued the notice under Section 148 which is legal and valid."

5 At the hearing of the petition, Mr. Tushar Hemani, learned advocate for the petitioner has submitted that the impugned notice for reopening of the assessment came to be issued on the last day of the 10th year from the expiry of the assessment year.

It is submitted that the Assessing Officer can issue notice for reassessment under section 147 of the Act if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for the relevant year and escapement of such income is by reason of the failure on the part of the assessee to make a return under Section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for the assessment for that assessment year. The assessee had made return under section 139 and there was no notice issued under sub-section (1) of Section 142 or Section 148 of the Act and the only provision invoked by the Assessing Officer was that, in view of the statutory amendment with retrospective effect, the assessee had failed to disclose fully and truly all material facts necessary for the assessment for that assessment year. However, when the assessee had filed the return for assessment year 1983-84 in the year 1983, apart from the fact that Explanation 8 was not in existence, the deponent-Assessing Officer has admitted in his affidavit-in-reply that there was controversy as to whether the interest paid after the date on which the machinery was installed and first put to use is required to be capitalised or is to be treated as revenue expenditure. The assessee is claiming depreciation allowance and investment allowance on capitalization of interest for the post installation period. In this view of the matter, there was no culpability on the part of the assessee. On the contrary, by capitalising such interest the assessee did not claim the same as revenue expenditure which the assessee otherwise could have claimed and obtained 100% deduction of the amount as revenue expenditure. Instead the assessee restricted its claim to investment allowance and depreciation allowance on capitalization of that interest which taken together was much less than the benefit which the assessee would have got as revenue expenditure.

Strong reliance is placed on the decision of this Court in Commissioner of Income Tax Vs. Bipin Vadilal

(238 ITR 1022), wherein the Court was concerned with a similar controversy arising from declaration of law by the Supreme Court. It is submitted that since the law declared by the Supreme Court also relates back to the date on which the relevant provision was enacted, retrospective effect given by the statutory amendment will also operate on the same principle and, therefore, notice for reopening of assessment under section 147 or 148 cannot be issued beyond the period of four years on the ground of failure to disclose material facts.

6 On the other hand, Mr.M.R.Bhatt, learned Standing Counsel for the department has submitted that since Explanation 8 was inserted with effect from 1/4/1974, the said statutory amendment must apply and operate with full force and vigour and that if the assessee's contention were to be accepted, it would amount to giving only prospective effect to the legislative amendment.

7 Having heard the learned Counsel for the parties, we are of the view that there is considerable substance in the submissions made on behalf of the petitioner.

Sections 147 and 149 of the Act at the relevant time read as under :

"If -

(a) the Assessing Officer has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return under section 139 for any assessment year to the Assessing Officer or to disclose fully and truly all material facts necessary for his assessment for the year, income chargeable to tax has escaped assessment for that year, or

(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Assessing Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year,

he may, subject to the provisions of sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance,

as the case may be, for the assessment year concerned (hereinafter in sections 148 to 153 referred to as the relevant assessment year).

149. (1) No notice under section 148 shall be issued,

(a) in cases falling under clause (a) of section 147-

(i) for the relevant assessment year,
if eight years have elapsed from the end of that year, unless the case falls under sub-clause (ii);

(ii) for the relevant assessment year,
where eight years, but not more than sixteen years, have elapsed from the end of that year, unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to rupees fifty thousand or more for that year ;

(b) in cases falling under clause (b) of section 147, at any time after the expiry of four years from the end of the relevant assessment year.

8 There is no dispute about the fact that the impugned notice has not been issued on the ground of failure on the part of the assessee to make return under section 139 because the return was already filed in the year 1983 nor is it the case of the department that there was failure on the part of the assessee to make return in response to the notice under section 142 or 148. The only clause invoked by the department is that on account of the statutory amendment with effect from 1/4/1974 the assessee was not entitled to capitalise the interest paid after the date of installation of the machinery and first put to use and, therefore, the assessee had failed to disclose fully and truly all material facts.

9 It is true that when there is a statutory amendment with retrospective effect, the statutory amendment has to operate as if the law as amended was there on the statute book. However, as per the settled legal position the fiction is to operate within the field which it is meant. Hence, if the proceedings were pending on 1/4/1986 when the statutory amendment was made, whether assessment proceedings or proceedings by

way of appeal or revision or reference, Explanation 8 would have certainly operated. However, on the question whether the assessee had failed to disclose fully and truly all material facts necessary for assessment, it is obvious that when the assessee had filed its return in 1983 it could not have assumed that such a legislative amendment was going to be made in the year 1986 with retrospective effect from the year 1974. In the facts of the present case, it could never be said by any stretch of imagination that in the year 1983 when the assessee filed return claiming investment allowance on the capitalization of interest paid after the date on which the machinery was first installed and put to use, the assessee had failed to disclose all material facts. On the contrary, the assessee would have got the benefit of the entire interest amount for the post installation period as revenue expenditure which would have been much higher than the amount of investment allowance and depreciation allowance taken together.

10 In CIT v. Navnitlal Sakarlal [1980] 125 ITR 67, this Court held that when the assessment was opened on the ground of declaration of law by this Court, it cannot be said that the plea as to escapement of income chargeable to tax from assessment was not entertained by the Assessing Officer on the ground that there had been failure on the part of the assessee to disclose truly and fully all material facts necessary for the assessment. Hence, no proceedings could have been initiated under Section 148 of the Income Tax Act beyond the expiry of four years from the end of the relevant assessment year. This case is squarely covered by clause (b) of Section 147 and not by clause (a) of Section 147.

11. In CIT vs. Hindustan Electro Graphites Ltd., (2000) 243 ITR 48, in the context of applicability of the provisions of Section 143(1A) of the Act, the Apex Court quoted with approval the following observations of the Calcutta High Court in Modern Fibotex India Ltd. vs. Deputy CIT (1995) 212 ITR 496 :-

"An assessee cannot be imputed with clairvoyance.

When the return was filed, the assessee could not possibly have known that the decision on the basis of which cash compensatory support had been claimed as not amounting to the assessee's income ceased to be operative by reason of retrospective legislation."

In the above decision, the Apex Court also followed its decision in Cement Marketing Co. of India

Ltd. vs. Assistant Commissioner of Sales Tax (1980) 124 ITR 15 under the sales-tax law where the Court said that a return cannot be said to be "false" unless there is an element of deliberateness in it. It is possible that even where the incorrectness of the return is claimed to be due to want of care on the part of the assessee and there is no reasonable explanation forthcoming from the assessee for such want of care, the Court may in a given case, infer deliberateness and the return may be liable to be branded as a false return. But where the assessee does not include a particular item in the taxable turnover under a bonafide belief that he is not liable so to include it, it would not be right to condemn the return as a "false" return

12. The same reasoning would apply for holding that for the purpose of deciding the question under Section 147 whether the assessee had disclosed fully and truly all material facts necessary for the relevant assessment year, the law applicable would be the law as it stood on the date of filing of the return.

13. In view of the above discussion, we are of the view that there was no failure on the part of the assessee to disclose truly and fully all material facts. Therefore, the condition precedent for invocation of the powers under Section 147 read with Sections 148 & 149 was not fulfilled. The impugned notice is, therefore, without any authority of law.

14. The petition is allowed. The impugned notice dated 31/3/1994 issued by the Income Tax Officer (Annexure-A) under Section 148 read with Section 147 of the Income Tax Act, 1961 is quashed and set aside.

Rule is made absolute with no order as to costs.

(M.S.Shah, J)

(D.A.Mehta, J)

m.m.bhatt